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IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-5509

THOMAS SCOTT ..... PETITIONER

VS.

COMMONWEALTH OF
KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT FOR CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below is Lenston and Scott v. Commonwealth of Kentucky, Ky. 497 S. W. 2d 561 (1973).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

I. **WHETHER THE KENTUCKY COURT OF APPEALS HAS RENDERED A DECISION NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.**

II. **WHETHER THE SUPREME COURT OF THE UNITED STATES SHOULD EXERCISE ITS POWER OF SUPERVISION OVER THE LOWER STATE COURTS FOR ALLEGED PREJUDICIAL PRACTICES.**

CONSTITUTION PROVISIONS INVOLVED

Petitioner relies upon the following Amendments to the United States Constitution:

AMENDMENT I, UNITED STATES CONSTITUTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT VII, UNITED STATES CONSTITUTION

"In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

AMENDMENT VIII, UNITED STATES CONSTITUTION

"Excessive bail shall not be required, no excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV, UNITED STATES CONSTITUTION SECTION 1.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privedges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ARGUMENT

I.

THE KENTUCKY COURT OF APPEALS OPINION WAS IN ACCORD WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner cites many infractions of this Court's previous decisions by the Kentucky Court of Appeals decision in the case at hand.

Petitioner's first assertion under this broad heading relates to the display of the plaque of the Ten Commandments in the court room during the petitioner's trial.

Petitioner urges that the presence of the Ten Commandments in the courtroom was prejudicial to his right of a fair trial; that in view of his life style of immorality and depravity such a religious symbol could have had a conscious or unconscious effect on the jury.

Petitioner cites the Supreme Court's School Prayer Cases in support of his argument. We suggest his reliance on these cases is misplaced, and his claim is without merit.

While the Ten Commandments are biblical in origin, the equivalent of each Commandment can be found in our statutory law. In fact, the Ten Commandments probably served as the source for Western civilization's law. We suggest the presence of the Ten Commandments in the courtroom would be no more prejudicial than the presence of statute books.

Furthermore, any effect of the Ten Commandments on the jury was no doubt slight in view of the enormity of the crime and uncontradicted testimony that Scott was indeed the culprit.

Petitioner's second attack upon his conviction relates to the failure of the trial court to grant a change of venue. No federal question is presented here, the Kentucky Court of Appeals Opinion on this issue rested on the interpretation of a state statute (Kentucky Revised Statutes 452.220(2)). Petitioner's affidavits of citizens in support of his motion for a change of venue did not meet the statutory requirement that the affiants were acquainted with the state of public opinion.

Petitioner's third allegation relates to the impact of this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Petitioner urges that he should have gotten a new trial as a result of the *Furman* v. *Georgia* decision. In *Furman* this Court specifically stated that the issue then before the Court was limited to the following issue:

> "Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

This Court held that the manner of imposing the death penalty was invalid. No where in this Court's Opinion can we find precedent for the proposition presently being advanced by the Petitioner.

In *McGautha* v. *California,* 402 U. S. 183, 91 S. Ct. 1454 (1971) the Court upheld the unitary method of determining guilt and punishment by a jury. There is nothing in *Furman* wherein the conclusion can drawn that the reasoning in McGautha has been totally rejected. Presumably the jury's finding of guilt is not affected by this Court's action in vacating the death penalty.

Petitioner's fourth assertion relates to the failure of the trial court to grant a sanity hearing. As noted in the Kentucky Court of Appeals opinion there never was really a claim made that petitioner could not intelligently participate in the trial. The issue of his insanity at the time of the commission of the offense was presented to the jury by instructions.

ARGUMENT

II.

THE ALLEGED PREJUDICIAL TRIAL ERRORS ARE NOT OF SUFFICIENT CONSTITUTIONAL MAGNITUDE AS TO REQUIRE THIS COURT TO EXERCISE ITS INHERENT RIGHT OF SUPERVISION.

Petitioner contends that if the Kentucky Court of Appeals does not exercise its power of supervision then the Supreme Court must. We disagree.

Unless there is some issue of a federal constitutional magnitude which has been interpreted erroneously by a state court this Court has no jurisdiction. Petitioner has not presented a question of sufficient

constitutional magnitude to warrant reversal. Even the Kentucky Court of Appeals conceded that the tactics engaged in by the prosecution in displaying the clothes worn by the murder victims was unnecessary. However the court found that the evidence amassed against the petitioner was so overwhelming and convincing that any possible prejudice would flow only to the penalty phase. Such a finding is entirely consistent with the view previously stated by this Court. Unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. *Schneble* v. *Florida*, 405 U. S. 427, 92 S. Ct. 1056 (1972) and *Chapman* v. *California*, 386 U. S. 18, 87 S. Ct. 824 (1967).

Petitioner's final blast relates to the fact that the Justices of the Kentucky Court of Appeals could not have impartially decided this case since there very jobs as justices were involved; that they should have vacated the bench and special justices hear the case. This issue was not presented in the Kentucky Court of Appeals, rather the issue was that the Kentucky Court of Appeals could not hear the case because each justice sitting was elected from malapportioned Court of Appeals districts. The Kentucky Court of Appeals based its decision on non federal grounds. The federal constitutional authority to determine the appeal had been previously decided against petitioner. See *Kaplan et al* v. *Milliken et al*, ... U. S. .... 93 S. Ct. 2293, 36 L. Ed. 2d 967 (1973).

CONCLUSION

The trial court and the Kentucky Court of Appeals' opinion are clearly supported by the evidence, and petitioner has not presented a substantial constitutional question that justifies the issuance of a Writ of Certiorari by this Court.

Respectfully submitted,

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